(6)

No. 89-6332

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT S. MINNICK,

*Petitioner,*

—v.—

STATE OF MISSISSIPPI,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Is it consistent with the Fifth and Sixth Amendments, as they apply to the states through the Fourteenth Amendment, for police to reinitiate interrogation of an accused in custody without counsel present despite the fact that the accused has counsel and has expressed the desire to deal with law enforcement officials only through that attorney?

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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## BRIEF FOR PETITIONER

This brief is respectfully submitted by petitioner Robert S. Minnick who was convicted of capital murder and sentenced to death in Mississippi in 1988. Minnick seeks reversal of the judgment of the Mississippi Supreme Court which affirmed his conviction and sentence.

## OPINIONS BELOW

The opinion of the Supreme Court of Mississippi on direct appeal affirming petitioner's capital murder conviction and death sentence is reported as *Minnick* v. *Mississippi*, 551 So. 2d 77 (Miss. 1988); it is reprinted at JA 69.[1]

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1 "JA _____" references are to pages in Joint Appendix.

## JURISDICTION

The judgment of the Mississippi Supreme Court affirming on direct appeal Minnick's conviction and death sentence was entered on December 14, 1988. A motion for rehearing was timely filed on January 5, 1989 and was denied on October 25, 1989. The petition for certiorari was filed on December 19, 1989 and was granted on April 23, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (1988).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. These provisions are set forth in the Statutory Appendix to this brief.

## STATEMENT OF THE CASE

Robert Minnick was convicted of capital murder in Lowndes County, Mississippi and was sentenced to death on August 6, 1987. His conviction and sentence were affirmed on December 14, 1988 (JA 69). A petition for certiorari was filed on December 19, 1989 and granted April 23, 1990.

## STATEMENT OF FACTS

The conviction of Robert Minnick for capital murder stemmed from the deaths of Lamar Lafferty and Donald Ellis Thomas, which occurred on April 26, 1986.[2] On Friday, August 22, 1986, Minnick was arrested in San Diego, California pursuant to capital murder warrants issued in Clarke County, Mississippi (JA 7, 27). On the same day, California

2 According to the facts recited in the Mississippi Supreme Court's opinion, James "Monkey" Dyess, the other participant in the crime, shot one of the victims in the back with a shotgun, and then told Minnick to shoot the second person (JA 72-73).



authorities advised Mississippi law enforcement officials that the arrest had been made (JA 27). When questioned by San Diego police about the crimes he allegedly committed in Mississippi, Minnick remained silent (JA 43).

The next day, August 23, 1986, two agents from the Federal Bureau of Investigation (the "FBI") stationed in San Diego sought to interview Minnick (JA 13). Despite the fact that Minnick told his San Diego jailers that he did not wish to see the FBI agents, the jailers "made [Minnick] go down anyhow" to speak with the agents (JA 45). At the interrogation Minnick refused a request that he sign a waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), when a waiver form was presented by the FBI agents (JA 14). Minnick ultimately did talk with the agents about matters unrelated to the capital murder charges against him (JA 14-15). When questioned by the FBI agents about the two Mississippi homicides for which he had been arrested, however, Minnick refused to speak further and explicitly invoked his right to have counsel appointed to represent him (JA 15-16). Minnick told the agents (as the FBI report set forth) to " '[c]ome back Monday when I have a lawyer,' and stated that he would make a more complete statement then with his lawyer present" (JA 16). Minnick twice repeated his request for counsel to the agents (*id.*).[3] The FBI agents respected Minnick's requests and ceased their interrogation (*id.*). Later that day, Minnick was provided with a San Diego public defender with whom he met (JA 46, 113).

Upon learning of Minnick's arrest, Deputy Sheriff J.C. Denham of the Clarke County Sheriff's Department flew to San Diego on August 24, 1986 to interrogate Minnick and escort him back to Mississippi (JA 58, 72). On Monday

3 The FBI report stated:

"MINNICK stated 'Come back Monday when I have a lawyer,' and stated that he would make a more complete statement then with his lawyer present."

"At this point no further questions were asked concerning the crimes . . . ."

"MINNICK repeated twice his request that Agents come to see him on Monday as soon as he had a lawyer." (JA 16)

morning, August 25, Deputy Denham went to the county jail in San Diego. The Mississippi Supreme Court determined that "[w]hen Denham arrived at the jail, the jailers told Minnick that he would have to go down and talk with Denham" (JA 74; *see also* 45).[4] No effort was made to notify Minnick's attorney of the impending reinterrogation. When asked at trial whether he had known that Minnick had invoked his right to counsel when interviewed by the FBI agents, Deputy Denham acknowledged that he had "a copy of the interview that the FBI conducted" (JA 38); the interview report reveals that Minnick had twice invoked his right to counsel and had declined to speak without his attorney being present (JA 16). *See* note 3 *supra*.

Notwithstanding that Minnick already had counsel, Deputy Denham began his uninvited reinitiated interrogation by reading Minnick his *Miranda* rights, which included statements suggesting that Minnick did not already have counsel (*e.g.*, "If you cannot afford a lawyer one will be appointed for you before any questioning if you wish") (JA 28-29). Deputy Denham then asked Minnick if he would sign a waiver of rights statement (JA 29, 38). Minnick refused to sign the statement, which provided as follows:

> "I have read this statement of my rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me." (JA 29)

Minnick refused to discuss the homicide or to respond to Deputy Denham's questions about it (JA 74). When pressed by Deputy Denham, Minnick first acquiesced in the request that he discuss his escape from the Clarke County Jail, but refused to discuss the charges of murder (*id.*). Then, according to Deputy Denham, Minnick confessed to his role in the homicides (JA 32-33).

4 Minnick's undisputed testimony was that his jailers told him that his lawyer—who had advised Minnick not to respond to any questions by the police—"wasn't nothing" and that he "had to talk to them [the police]" (JA 47).



Prior to trial, Minnick's attorney filed three motions challenging the admissibility of the confession (JA 17-18, 21-22, 23-24). Counsel specifically relied on this Court's decision in *Edwards* v. *Arizona*, 451 U.S. 477 (1981) (JA 23). The trial court denied the original motion to suppress (JA 19), denied it again when renewed (JA 20), and adhered to its decision at trial when the State put on Deputy Denham to testify about Minnick's inculpatory statements (JA 25).

At Minnick's capital murder trial, the confession was the central focus of the State's case. It was relied on by the State in the prosecutor's opening (Tr. 713-14)[5], and argued to the jury in closing (Tr. 1094-95, 1122). Deputy Denham testified at length about the investigation he conducted into the murders (Tr. 914-55), which was capped by his interrogation of Minnick and the resulting inculpatory statements (JA 59-65). No other evidence dealt with any inculpatory statements by Minnick; Minnick himself did not testify. Minnick was convicted of capital murder and sentenced to death (JA 67).

On direct appeal to the Mississippi Supreme Court, counsel to Minnick again argued that once Minnick had invoked his right to have counsel present, no state-initiated interrogation was constitutional in the absence of the attorney who had been appointed to represent him (JA 75).

In rejecting Minnick's Fifth Amendment claim under *Edwards* v. *Arizona*, the Mississippi court held:

> "While it is true Minnick invoked his Fifth Amendment right to counsel, it is also true, by his own admission, that Minnick was provided an attorney who advised him not to speak to anyone else about any charges against him. In this kind of situation, the *Edwards* bright-line rule as to initiation does not apply. The key phrase in *Edwards* which applies here is 'until counsel has been made available to him.' [*Edwards* v. *Arizona*, 451 U.S.]

5 "Tr. _____" references are to the Transcript as filed with the Mississippi Supreme Court.

at 485, 101 S. Ct. at 1885." (JA 75-76; footnote omitted)

"Since counsel was made available to Minnick," the Mississippi Supreme Court held, "his Fifth Amendment right to counsel was satisfied" (JA 76), despite the reinitiated interrogation by the State.

Minnick's Sixth Amendment claim fared no better. Although the Mississippi court recognized the concession of the State that Minnick's right to counsel had attached before Deputy Denham's interrogation (JA 76), the court nonetheless held that because Minnick knew he had the right to have counsel present during Deputy Denham's reinitiated interrogation and Minnick had spoken to counsel, he must have effectively waived that right. The court made no mention of the rule of *Michigan* v. *Jackson*, 475 U.S. 625 (1986), which prohibits all state-initiated interrogation once an accused's Sixth Amendment right to counsel has attached and been asserted. The court went on to acknowledge that, during his interrogation by Deputy Denham, Minnick had "refused to sign a waiver of rights form," apparently believing that he was not waiving his rights (JA 78). Instead of concluding from this that Minnick had plainly not intended to waive any rights, the court concluded instead that Minnick had done so.

In dissent, Justice Robertson maintained that the majority's interpretation of *Edwards* v. *Arizona* was inconsistent with that ruling's holding and spirit (JA 114-15, 117). To illustrate the wrong done in this case, Justice Robertson analogized to the ethical rules governing civil cases:

> "We have a rule that seems to work well in civil cases. A lawyer is forbidden to communicate with the opposing party who has a lawyer without that lawyer being present. At the very least he must give notice of his intentions to or obtain consent of opposing counsel. This rule is undergirded by an ethical principle. All accept that a lawyer who approaches a represented third party without going through counsel should be severely sanctioned. And this is so though the lawyer uses a lay representative or paralegal to do his dirty work." (JA 112; footnotes omitted)



Justice Robertson concluded that the majority's reading of the facts to construe a waiver of Minnick's Sixth Amendment right amounted to "a policy of preference for ignorance or waiver in the valid rules in the field" (JA 116) and was irreconcilable with the "strong presumption against waivers of the protections of counsel" (JA 116; citation omitted). Justice Robertson concluded:

> "Where tensions are high, controversy great, and much at stake (and there is never more at stake than in a case of capital murder), the need for bright line rules is at its highest. The form of the rule formally recognizing the accused's right to counsel should provide an identifiable line between what may be done and what may not. All should be told that, once the right to counsel has attached, the accused be dealt with only through counsel. Such clarity in expression is as important to law enforcement as to the citizen. *See Arizona* v. *Roberson*, 486 U.S. 675, ____, 108 S. Ct. 2093, 2097, 100 L. Ed. 2d 704, 713 (1988). This is no novel idea. Did not even *Miranda* say as much?" (JA 116-17)[6]

## SUMMARY OF ARGUMENT

Numerous decisions of this Court construing the Fifth and Sixth Amendments require reversal.

This Court's decision in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), mandates reversal on Fifth Amendment grounds because the State violated Minnick's constitutional privilege against compelled self-incrimination. Under *Edwards* v. *Arizona*, if the accused invokes the right to counsel, the

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6 In response to Minnick's petition for rehearing (which was denied by a 4-3 vote) (JA 119), the Mississippi Supreme Court posed the question to the parties of whether the outcome of the court's interpretation of *Edwards* should be changed in light of the decision in *Roper* v. *Georgia*, 258 Ga. 847, 375 S.E.2d 600 (Ga.), *cert. denied*, 110 S. Ct. 290 (1989) (JA 118).

police are required to respect that request, cease interrogation, and not reinitiate interrogation in the absence of counsel. The two FBI agents respected Minnick's Fifth Amendment rights as set forth in *Edwards*. Deputy Denham did not. The interpretation of *Edwards* offered by the Mississippi Supreme Court to justify Deputy Denham's actions would allow the police to compel an accused to submit to reinitiated interrogation without notice to the accused's attorney, and without the attorney's presence, even though the accused has demanded counsel and an attorney-client relationship actually exists. This rule finds no support in *Edwards* itself and is flatly inconsistent with this Court's later characterizations of that opinion. It is also inconsistent with the reading of *Edwards* v. *Arizona* repeatedly given by lower federal and state courts and the law enforcement community.

Further, because Minnick's Sixth Amendment right to counsel attached upon the issuance by Mississippi of the capital murder arrest warrants, and because Minnick unequivocally invoked that right, his confession was the unconstitutional product of police-initiated interrogation in violation of *Michigan* v. *Jackson*, 475 U.S. 625 (1986). Mississippi was required to use Minnick's attorney as the sole medium in substantive dealings with Minnick about the case. *Maine* v. *Moulton*, 474 U.S. 159 (1985); *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Massiah* v. *United States*, 377 U.S. 201 (1964).

Decisions such as *Edwards* v. *Arizona* and *Michigan* v. *Jackson* are now well-established articulations of the commands of the Fifth and Sixth Amendments. See *Michigan* v. *Harvey*, 110 S.Ct. 1176 (1990). The ruling of the Mississippi Supreme Court here is at odds with the core of those rulings.



## ARGUMENT

### I.

### THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE MINNICK'S CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT

To assure the protection of the Fifth Amendment privilege, this Court has long held that certain procedural safeguards must be enforced. Because the inherent pressures of custodial interrogation threaten this constitutional guarantee with particular force, the decisions of this Court have sought to ensure that any potentially incriminating statement made in that context is a product of free will. *E.g.*, *Edwards* v. *Arizona*, 451 U.S. 477 (1981); *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The incriminating statements extracted from Minnick by Deputy Denham contravened these guarantees and, therefore, violated Minnick's privilege against compulsory self-incrimination: Minnick was compelled to see Deputy Denham after invoking his Fifth Amendment right to counsel; the initiative for the reinterrogation was Deputy Denham's; and the reinterrogation occurred without Minnick's attorney being present or even notified. The decision of the Mississippi court allowing police-initiated reinterrogation after the invocation of counsel and countenancing the exclusion of the accused's counsel from such reinitiated interrogation is in direct conflict with governing authorities of this Court. In circumstances such as these—in fact, in circumstances less egregious than these—this Court has consistently vacated convictions based on statements made during custodial interrogation.

#### A. This Court's Decision In *Edwards* v. *Arizona* Mandates Reversal

The judgment of the Mississippi Supreme Court affirming the conviction and sentence here is at odds with repeated decisions by this Court recognizing that the Fifth Amendment privilege against self-incrimination is "the essential mainstay

of our adversarial system." *Miranda* v. *Arizona*, 384 U.S. at 460. Specifically, this case is directly controlled by *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

Without more, the extraordinary similarity between this case and *Edwards* mandates reversal. In *Edwards* this Court reiterated deeply rooted Fifth Amendment principles, emphasizing that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards* v. *Arizona*, 451 U.S. at 485. Moreover, this Court specifically confirmed that "[t]he Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation." *Id.* at 485-86.[7]

After the issuance of an arrest warrant, Edwards was arrested on charges of robbery, burglary and first-degree murder. At the police station, Edwards was informed of his *Miranda* rights; he stated that he understood his rights and initially agreed to submit to interrogation. Edwards denied involvement, offered an alibi defense and sought to make a deal. The interrogating officer gave Edwards an attorney's phone number and, following the conversation, Edwards said: " 'I want an attorney before making a deal.' " Apparently the officer considered this an invocation of Edwards' Fifth Amendment rights because questioning then ceased. *Id.* at 478-79.

The next morning, two different officers came to the jail and asked to see Edwards. Edwards refused to see anyone but "[t]he guard told him that 'he had' to talk and then took him to meet with the detectives." *Id.* at 479. The officers informed Edwards of his *Miranda* rights and played him the taped statement of his alleged accomplice who had implicated him. Edwards, afterwards, agreed to talk so long as it was not taped and went on to implicate himself in the crime. *Id.*

7 Concurring opinions in *Edwards* agreed that when a suspect is "taken from his cell against his will and subjected to renewed interrogation . . . it clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel." *Edwards* v. *Arizona*, 451 U.S. at 490 (Powell & Rehnquist, JJ., concurring). *See also id.* at 488 (Burger, C.J., concurring).



Because Edwards was compelled to see the officers—who returned not at his suggestion or request—after invoking his right to counsel and because Edwards was reinterrogated without counsel present, the Court held that the use of the compelled confession against him at trial violated his Fifth Amendment rights. *Id.* at 487. The *Edwards* Court determined that the Supreme Court of Arizona had erred in finding that the statements made by Edwards after he was "told he had to" speak to the officers were the product of a voluntary waiver. *Id. See also id.* at 488 (Burger, C.J., concurring); *id.* at 490 (Powell and Rehnquist, JJ., concurring).

This case may be resolved on the fundamental legal principles reinforced by the *per se* rule of *Edwards*. When the FBI agents sought to question Minnick about the two homicides for which he had been arrested, he refused to see them but was told he had to speak with them (JA 45); Minnick—like Edwards—invoked his right to have counsel present, and told the agents to come back when he had a lawyer present (JA 16).[8] The FBI agents respected Minnick's request and ceased their interrogation (JA 16). After the FBI interrogation, Minnick was provided with an attorney who spoke with him (JA 46, 74).

Similar to the treatment Edwards received, the Mississippi Supreme Court found that "when Deputy Denham arrived at the jail two days later," the jailers "told Minnick that he would have to go down and talk to Denham" (JA 74). Deputy Denham again informed Minnick of his *Miranda* rights—as if he had no lawyer at all—and began to interrogate him (*id.*). Minnick refused to sign a waiver form (*id.*), refused to discuss the murder and also refused to give a signed statement or to allow any recording to be made (JA 38). No lawyer was present during this reinitiated interrogation, although Minnick had previously asserted his right to counsel and had

8 From the beginning, Minnick consistently resisted efforts to interrogate him. For example, on August 22, when the San Diego police first sought to interrogate him, Minnick "would tell them nothing and . . . didn't look at them" (JA 43). On August 23, Minnick told the jailers that he did not wish to talk with the FBI, but was nonetheless compelled to do so (JA 45).

been appointed counsel with whom he had consulted (JA 46, 113). It was at this reinitiated interrogation that Minnick's incriminating statements were obtained (JA 61-63). This case, like *Edwards*, should be reversed because of a patent violation of the accused's Fifth Amendment rights.

### B. The Judgment Below Rests On A Distorted Reading Of *Edwards* v. *Arizona*

In holding the *Edwards* rule inapplicable, the Mississippi Supreme Court concluded that reinterrogation after an accused has invoked his Fifth Amendment right to counsel is proper because "[t]he key phrase in *Edwards* which applies here is 'until counsel has been made available to him' " (JA 76, quoting *Edwards* v. *Arizona*, 451 U.S. at 484-85). When this "key" phrase is replaced in the passage from which it was extracted, however, it is apparent that the Mississippi Supreme Court distorted this Court's language and decision in *Edwards*:

> "[W]e now hold that when the *accused has invoked his right to have counsel present during custodial interrogation*, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, *having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him*, unless the accused himself initiates further communication, exchanges, or conversations with the police.
>
> "*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused '*the interrogation must cease until an attorney is present*.' 384 U.S. at 474. Our later cases have not abandoned that view." *Edwards* v. *Arizona*, 451 U.S. at 484-85 (JA 75; emphasis supplied; footnote omitted).



Given the language preceding and following this "key" phrase, it is inconceivable that this Court intended to require the mere *availability* of counsel, which the Mississippi Supreme Court suggests means a brief consultation, rather than the actual *presence* of counsel. This reading is compelled for two reasons.

First, before the "key" phrase, the Court plainly stated that an accused's Fifth Amendment right is "to have counsel *present* during custodial interrogation." *Edwards* v. *Arizona*, 451 U.S. at 484 (emphasis supplied). The next clause, rather than addressing the "right," set parameters for the *waiver* of the right. At this point, the Court restated its holding in *Miranda* that the invocation of the Fifth Amendment right to counsel is "a significant event" requiring that " 'interrogation must cease until an attorney is present.' " *Id.* at 485 (*quoting Miranda* v. *Arizona*, 384 U.S. at 474).

Second, with this clear Fifth Amendment rule in place, the language in the sentence immediately preceding the "key" phrase takes on a more precise meaning. When the Fifth Amendment right to have counsel present is invoked, the accused has "expressed his desire to deal with the police only through counsel." *Id.* at 484. Yet the reading of these words by the Mississippi Supreme Court never requires the police to deal *through* counsel at all.[9]

In *Miranda*, this Court observed that the danger inherent in custodial interrogation is that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so

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9 In addition, although the rule requires that counsel be made available to the accused, nothing in *Edwards* suggests that this means that counsel, once appointed, may thereafter be cut-out of the state's substantive contacts with the accused. This is particularly true where, as here (JA 16), the accused has stated that a precondition to his giving a statement is that counsel be present at the interrogation.

freely." *Miranda* v. *Arizona*, 384 U.S. at 467.[10] The *Miranda* Court stressed that it was counsel's presence that was crucial: "The *presence* of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His *presence* would ensure that statements made in the government-established atmosphere are not the product of compulsion." *Id.* at 466 (emphasis supplied). The actual presence of counsel would "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469. The Mississippi Supreme Court's "rule" that mere consultation with counsel satisfies Fifth Amendment requirements is at odds with the core holding of *Miranda*:

> "Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, *the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.*" *Id.* at 470 (emphasis supplied; citation omitted).[11]

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10 The *Miranda* Court reviewed the techniques of persuasion and the psychological ploys listed, and specifically encouraged, in police policy manuals to increase the number of confessions. *Miranda* v. *Arizona*, 384 U.S. at 449-54. The Court concluded that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455 (footnote omitted). *See also Illinois* v. *Perkins*, 58 U.S.L.W. 4737 (U.S. June 4, 1990) (No. 88-1972) (confirming the necessity of *Miranda*'s protections during custodial interrogation); *Rhode Island* v. *Innis*, 446 U.S. 291, 299 (1980) (construing broadly "techniques of persuasion" as "interrogation" because "[t]he concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination").

11 In *Fare* v. *Michael C.*, 442 U.S. 707 (1979), this Court reiterated that the *per se* rule of *Miranda*—that an accused has the right to have an attorney present at a custodial interrogation—is "based on the unique role the lawyer plays in the adversary system of criminal justice in this country." *Id.* at 719. Specifically, the *Fare* Court recognized that the rule in *Miranda*

> "was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system' established by the Court. *Id.*, at 469. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. 384 U.S. at 470." *Id.*



*Miranda* established, and *Edwards* confirmed, two clear rules applicable here: (1) the accused has a right to have an attorney present during custodial interrogation, and (2) when an accused invokes his right to counsel, the authorities must stop the interrogation and may not compel the accused to undergo further interrogation without an attorney present. The judgment below cannot be reconciled with these rules.

### C. The Mississippi Supreme Court's Ruling Is Inconsistent With This Court's Characterizations Of *Edwards* v. *Arizona*

#### 1. Subsequent Decisions Of This Court Have Reaffirmed An Accused's Fifth Amendment Right To Have Counsel Present At A Custodial Interrogation

Until the Mississippi Supreme Court reinterpreted *Edwards* in this case, there was little confusion as to the meaning of this Court's decision.[12] This Court has reaffirmed that the

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12 Other courts have generally agreed that *Miranda* and *Edwards* forbid any state-initiated interrogation without counsel present once the accused has requested that counsel act as a medium between him and the government. *E.g.*, *Towne* v. *Dugger*, 899 F.2d 1104, 1106 (11th Cir. 1990) (*Edwards* requires that once an accused requests counsel, "all questioning must stop

Fifth Amendment requires that reinterrogation only occur with counsel *present*. For example, in *Moran* v. *Burbine*, 475

until an attorney is present, unless the defendant subsequently initiates conversation with the authorities"); *Smith* v. *Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988) ("[n]ot only must all questioning stop when a suspect expresses his desire for counsel, but questioning can be resumed without a lawyer only if the suspect himself initiates further communication"); *Terry* v. *LeFevre*, 862 F.2d 409, 412 (2d Cir. 1988) (*Edwards* requires that "once counsel is requested, all interrogation must cease until an attorney is present"); *McFadden* v. *Garraghty*, 820 F.2d 654, 657-58 (4th Cir. 1987) (*Miranda* and *Edwards* require that when an accused requests counsel, interrogation must cease until an attorney is present); *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 126 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987) (after the accused's assertion of his right to counsel, he was "to be assisted by counsel at any interrogation, concerning any crime, that the police or prosecutors conducted while he remained in continuous physical custody"); *Pittman* v. *Black*, 764 F.2d 545, 546 (8th Cir.), *cert. denied*, 474 U.S. 982 (1985) (*Edwards* requires that after an accused requests counsel, "he cannot be subjected to further interrogation in the absence of counsel" unless he initiates further communications with the police); *United States* v. *Scalf*, 708 F.2d 1540, 1543 (10th Cir. 1983) (recognizing that *Edwards* was expressly decided upon *Miranda*'s requirement that after the invocation of the right to counsel interrogation must cease until counsel is present); *United States* v. *Weisz*, 718 F.2d 413, 428 n.93 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1027, 1034 (1984) ("*Miranda* and subsequent decisions establish beyond question that if an 'individual states that he wants an attorney, the interrogation must cease until an attorney is present' ").

The rulings of state supreme courts have been almost as uniform. *See, e.g.*, *Colorado* v. *Trujillo*, 773 P.2d 1086, 1091 (Colo. 1989) (*en banc*) (*Edwards* requires that "once a defendant requests counsel during custodial police interrogation, all 'interrogation must cease until an attorney is present' "); *Shipley* v. *Delaware*, 570 A.2d 1159, 1167 (Del. 1990) (once an accused requests counsel, the police must "cease their interrogation until counsel is present"); *Roper* v. *Georgia*, 258 Ga. 847, 375 S.E.2d 600, 602, *cert. denied*, 110 S. Ct. 290 (1989) (under *Edwards* "once an accused in custody invokes the right to counsel, he should not be subject to further interrogation by the authorities until counsel is present," unless the accused initiates further contact with the police); *Illinois* v. *Gacho*, 122 Ill. 2d 221, 522 N.E.2d 1146, 1154, *cert. denied*, 109 S. Ct. 264 (1988) ("[u]nder *Miranda* and its progeny, once an individual states that he wants an attorney, all interrogation must cease until an attorney is present"); *Doerner* v. *Indiana*, 500 N.E.2d 1178, 1180 (Ind. 1986) (Fifth and Fourteenth Amendments guarantee "to each citizen the right to the presence and advice of counsel during custodial interrogation by the police"); *Iowa* v. *Newsom*, 414 N.W.2d 354, 357 (Iowa



U.S. 412 (1986), this Court rejected the suggestion that "the Fifth Amendment 'right to counsel' requires anything more than that the police inform the suspect of his right to representation and honor his request that the *interrogation cease until his attorney is present*." *Moran* v. *Burbine*, 475 U.S. at 423 n.1 (*citing Michigan* v. *Mosley*, 423 U.S. 96, 104 n.10

1987) (*Edwards* requires that after invocation of the right to counsel, "absent counsel further interrogation may not occur unless the accused initiates the subsequent conversation"); *Louisiana* v. *Arceneaux*, 425 So. 2d 740, 744 (La. 1983) (*Edwards* holds that after "an accused has invoked his right to have counsel present during custodial interrogation," the accused cannot waive this right by merely responding to police initiated interrogation); *Maryland* v. *Conover*, 312 Md. 33, 537 A.2d 1167, 1168 (1988) (*Edwards* requires that after an accused requests an attorney, "interrogation must cease until an attorney is present," unless the accused initiates further contact with the police); *Missouri* v. *Morris*, 719 S.W.2d 761, 763 (Mo. 1986) (*en banc*) ("the request for counsel bars further interrogation until an attorney is present, unless the accused in the interim voluntarily initiates discussion"); *Nebraska* v. *Pratt*, 234 Neb. 596, 452 N.W.2d 54, 57 (1990) ("*Edwards* held that when an accused asserts the right to counsel, interrogation must cease until counsel is present *or* the accused initiates further communications"); *Koza* v. *Nevada*, 102 Nev. 181, 718 P.2d 671, 674 (1986), *appeal after remand*, 756 P.2d 1184 (Nev. 1988), *cert. denied*, 109 S. Ct. 2069 (1989) ("[o]nce an accused has asserted the right to counsel, all interrogation must cease until an attorney is present"); *Ohio* v. *Broom*, 40 Ohio St. 3d 277, 533 N.E.2d 682, 692 (1988), *cert. denied*, 109 S. Ct. 2089 (1989) ("once an accused has invoked a right to counsel, the state must cease all questioning unless counsel is present"); *Vermont* v. *Preston*, 150 Vt. 511, 555 A.2d 360, 362 (1988) (state violated *Edwards* by interrogating the defendant in an "uncounselled setting" after the invocation of his right to counsel); *Washington* v. *Stewart*, 113 Wash. 2d 462, 780 P.2d 844, 847 (1989) (*en banc*), *cert. denied*, 110 S. Ct. 1327 (1990) ("to protect the integrity of the *Miranda* rule, *Edwards* established an exclusionary rule in the event evidence is obtained in counsel's absence, after the accused has requested counsel's presence"); *West Virginia* v. *Bowyer*, 380 S.E.2d 193, 196 (W. Va. 1989) (after an accused invokes his right to counsel, "it is improper for the police to initiate any communication with the suspect other than through his legal representative"); *Wisconsin* v. *Turner*, 136 Wis. 2d 333, 401 N.W.2d 827, 834 (1987) (holding *Edwards* "not at all inconsistent" with principle that the invocation of the right to counsel "triggers a *per se* termination of questioning until an attorney is present"). *But see South Carolina* v. *Zaremba*, 386 S.E.2d 459, 460 (S.C. 1989); *South Dakota* v. *Cody*, 323 N.W.2d 863, 867 (S.D. 1982).

(1975)) (emphasis supplied). *See also Arizona* v. *Roberson*, 486 U.S. 675, 680 (1988) ("[t]he rule of the *Edwards* case came as a corollary to *Miranda*'s admonition that '[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present' "); *Michigan* v. *Jackson*, 475 U.S. at 629 ("[t]he Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations"); *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1043 (1983) (plurality) (Op. of Rehnquist, J.) ("[i]n *Edwards* . . . [w]e held that subsequent incriminating statements made without his attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments").

On numerous occasions since *Edwards*, this Court has focused on the importance of an attorney's presence because of the inherently coercive nature of custodial interrogation. *See, e.g., Michigan* v. *Harvey*, 110 S. Ct. 1176, 1180 (1990) ("*Edwards* thus established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights"). Repeatedly, this Court has stated that the Fifth Amendment right against self-incrimination "is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges." *Arizona* v. *Roberson*, 486 U.S. at 685 (holding that *Edwards* applies even when the second police-initiated interrogation occurs in the context of a separate investigation). *See also Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988) ("[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny"); *Arizona* v. *Mauro*, 481 U.S. 520, 529-30 (1987) (recognizing the purpose behind *Miranda* and *Edwards* is "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment").



**2. The "Bright-Line" Character Of *Edwards* Has Provided Clear And Enforceable Guidance For Law Enforcement Officials**

The *Edwards* rule is not, as the Mississippi Supreme Court suggested (JA 75-76), one that requires the authorities merely to permit a brief consultation with counsel before an accused who has invoked his right to have counsel present may be reinterrogated. Instead, *Edwards* itself held that to protect a suspect's Fifth Amendment rights, a valid waiver of the right to counsel cannot be found absent "the *necessary fact* that the accused, not the police, reopened the dialogue with the authorities." 451 U.S. at 486 n.9 (emphasis supplied). And in *Solem* v. *Stumes*, 465 U.S. 638 (1984), this Court stated:

> "*Edwards* established a bright-line rule to safeguard preexisting rights, not a new substantive requirement. Before and after *Edwards* a suspect had a right to the presence of a lawyer, and could waive that right. *Edwards* established a new test for when that waiver would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication." 465 U.S. at 646.[13]

These consistent interpretations of *Edwards*, in turn, have produced clear guidance for the law enforcement officers who are called upon to respect the rule. The creation of a "bright-line" rule has "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation." *Fare* v. *Michael C.*, 442

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13 *See also Arizona* v. *Roberson*, 486 U.S. at 680-81 (*Edwards* "concluded that reinterrogation may only occur if 'the accused himself initiates further communication, exchanges or conversations with the police' "); *Moran* v. *Burbine*, 475 U.S. at 423 n.1 ("[w]hen a suspect *has* requested counsel, the interrogation must cease, regardless of any question of waiver, unless the suspect himself initiates the conversation") (emphasis in original); *Oregon* v. *Bradshaw*, 462 U.S. at 1044 (plurality) (Op. of Rehnquist, J.) (in *Edwards* "we held that after the right to counsel has been asserted by an accused, further interrogation of the accused should not take place 'unless the accused himself initiates further communication, exchanges, or conversations with the police' ").

U.S. at 718.[14] With particular regard to *Edwards*, this Court has stated: "The *Edwards* rule thus serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Arizona* v. *Roberson*, 486 U.S. at 682. Elsewhere, this Court recognized the problems inherent in situations without the *Edwards* rule: "In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (*per curiam*) (citations omitted).

14 One of the benefits of a "bright-line" rule is that it provides a comprehensible standard by which law enforcement officers may conduct their business. As was stated in *Rhode Island* v. *Innis*: "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures . . . ." 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). *See also Arizona* v. *Roberson*, 486 U.S. at 681 ("[w]e have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*") (citations omitted).

Police procedures reflect respect for, as well as the ability to enforce, *Edwards*. A review of manuals developed to guide law enforcement officers in the fulfillment of their duties reveals no instance where the officers are told that they may reinitiate interrogation in the absence of counsel once the suspect has requested an attorney. *E.g.*, J. Ferdico, *Criminal Procedure for the Criminal Justice Professional* at 312 (4th ed. 1989) (once right to counsel is invoked "police may not further interrogate the defendant without affording him or her counsel, unless the defendant initiates further communication with the police"); F. Inbau, J. Reid & J. Buckley, *Criminal Interrogation and Confessions* at 291 (3d ed. 1986) (*Edwards* established "[a] prerequisite to the validity of any waiver that may follow an initial exercise of *Miranda* rights is that the suspect himself must initiate a willingness to talk"); Legal Bureau, Police Department of the City of New York, *Constitutional Criminal Law: Legal Policy* at 81 (Jan. 1990) ("whenever a person's Right to counsel has attached [including after a request for an attorney], he may *not* be questioned about the case *unless* and *until* a lawyer is physically present when he agrees to speak to the police") (emphasis in original); D. Rutledge, *Criminal Interrogation Law and Tactics* at 87 (1987) ("once a suspect is in custody or has been formally charged, if he requests an attorney," he can be further questioned only where "he himself independently decided to initiate renewed discussion" or he "knowingly relinquished his right to counsel").



A rule advising police officers that, once counsel has been requested (and, as in this case, actually provided), interrogation may not be reinitiated without counsel being present is both clear and commonsensical.[15] The interpretation adopted here by the Mississippi Supreme Court, on the other hand, would instruct police officers that they need only allow the suspect to have the most minimal contact with counsel, and that they could reinitiate interrogation without counsel present in an effort to override the suspect's clearly expressed wishes. The rule announced by the Mississippi court in this case is directly contrary to *Edwards*.

15 Even if the record left open (which it does not, *supra* at 4) the question of whether Deputy Denham personally knew that Minnick had formally invoked his right to counsel, it would not matter because "[t]he police department's failure to honor that request [for counsel] cannot be justified by the lack of diligence of a particular officer." *Arizona* v. *Roberson*, 486 U.S. at 688. The only way to ensure that the accused's demand for counsel, properly memorialized in a written report by the first interrogating officer, is respected is to require that "[c]ustodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel." *Id.* Accordingly, it is of "no significance . . . that the officer who conducted the second interrogation did not know that respondent had made a request for counsel." *Id. Accord Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (promise by one prosecutor to defendant attributed to Government). It is incumbent upon the law officer to determine whether the accused has requested counsel. *Arizona* v. *Roberson*, 108 S. Ct. at 2101.

As this Court noted in *Michigan* v. *Jackson*, "Sixth Amendment principles require that we impute the State's knowledge from one State actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendant's unequivocal request for counsel to another state actor (the court)." 475 U.S. at 634 (footnote omitted). The fact that Deputy Denham was from Mississippi and Minnick was in a San Diego jail cell makes no difference in imputing the knowledge that the request had been made. *See Cervi* v. *Kemp*, 855 F.2d 702, 706 n.10 (11th Cir. 1988) (Georgia investigator held to know of defendant's invocation of counsel in Iowa jail for *Edwards/Jackson* purposes).

## II.

## THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE MINNICK'S CONVICTION WAS OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT

By reinitiating interrogation and obtaining a confession after Minnick's right to counsel had attached, and after Minnick had requested and actually consulted with his attorney, the State also violated Minnick's Sixth Amendment rights. *See Michigan* v. *Jackson*, 475 U.S. 625 (1986). Deputy Denham's interrogation circumvented Minnick's right to "rely on counsel as a 'medium' between him and the State," *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985), and in this way as well contravened Minnick's Sixth Amendment right to counsel. This Court has consistently vacated convictions based on evidence obtained through a violation by the State of this fundamental right. *E.g.*, *Michigan* v. *Jackson*; *Maine* v. *Moulton*; *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Massiah* v. *United States*, 377 U.S. 201 (1964). It should do so here.

### A. Minnick's Sixth Amendment Right To Counsel Had Attached Prior To Deputy Denham's Reinitiated Interrogation

As recognized by the Mississippi Supreme Court here (upon the concession of the Mississippi Attorney General (JA 68)), Minnick's right to counsel had attached under Mississippi law (JA 76). In Mississippi "[a] prosecution may be commenced . . . by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." Miss. Code Ann. § 99-1-7 (1972).[16] Thus, the issuance of an

16 The purpose of this Mississippi rule is to compensate for certain idiosyncracies of Mississippi procedure. As the Mississippi Supreme Court has observed, a holding whereby the right to counsel attached only at indictment or arraignment in Mississippi "would be wholly unworkable." *Page* v. *Mississippi*, 495 So. 2d 436, 440 n.5 (Miss. 1986) ("[w]ith grand juries meeting infrequently . . . , such an approach would have the right to counsel available to the accused only after many months had passed following arrest. We also take note of the practice in many of our counties of postponing arraignment in order to avoid the impact of our 270 day rule") (*citing* Miss. Code Ann. § 99-17-1 (Supp. 1985)). The court therefore held that the right attaches immediately upon arrest pursuant to process by a Mississippi court or at any time after the accused "has in fact secured the services of counsel." 495 So. 2d at 440. Any other rule, the court held, "would, simply put, have the effect of providing that the accused had the right to counsel only after it could be said with reasonable certainty that it would no longer do him any good, *i.e.*, after the point when any competent law enforcement officer would long since have obtained a confession or other inculpatory statement." *Id.* at 440 n.5.



arrest warrant constitutes the commencement of adversary proceedings in Mississippi, and hence represents the point at which the accused's right to counsel attaches. *Livingston* v. *Mississippi*, 519 So. 2d 1218, 1221 (Miss. 1988); *Page* v. *Mississippi*, 495 So. 2d 436, 439 (Miss. 1986); *Cannaday* v. *Mississippi*, 455 So. 2d 713, 722 (Miss. 1984).

The Justice Court of Clarke County, Mississippi issued warrants on May 6, 1986 for Minnick's arrest on the capital murder charges (JA 7). The warrants, based on affidavits setting forth the result of the Sheriff's investigation (JA 2-6), which was the principal responsibility of Deputy Denham (JA 26), specifically state that Minnick had been charged with capital murder and should be brought before the court to be examined on such charge (JA 7). That being so, the Mississippi court's conclusion that Minnick's Sixth Amendment right to counsel had attached under Mississippi law is in line with this Court's jurisprudence. For Sixth Amendment purposes, attachment occurs "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972).[17] To determine when formal criminal proceedings

17 *See also Brewer* v. *Williams*, 430 U.S. at 398 ("right to counsel granted by the Sixth and Fourteenth Amendments means at least that a per-

begin for the purposes of initiating the Sixth Amendment guarantee, this Court looks to the criminal law of the state in question, *Moore* v. *Illinois*, 434 U.S. 220, 228 (1977) (Sixth Amendment attached at point formal proceedings began under Illinois law), and should do so in this case.

### B. Minnick's Confession Was Obtained Upon Police-Initiated Interrogation In Violation Of *Michigan* v. *Jackson*

The Sixth Amendment right to counsel rule enunciated by this Court in *Michigan* v. *Jackson* was abridged when Deputy Denham reinitiated interrogation after Minnick had clearly invoked his right to have counsel present (JA 16). On direct appeal, the Mississippi Supreme Court improperly analyzed Minnick's Sixth Amendment claim by failing to recognize the applicability of *Jackson*. Exacerbating this, the Mississippi Supreme Court ignored the holding of *Michigan* v. *Jackson* that there can be no waiver upon a police-initiated interrogation once the right to counsel has attached and has been asserted. *Michigan* v. *Jackson*, 475 U.S. at 635. *See also Michigan* v. *Harvey*, 110 S. Ct. at 1181; *Patterson* v. *Illinois*, 487 U.S. at 297-98. There should have been no further inquiry.

In *Michigan* v. *Jackson*, the Court extended the prophylactic rule of *Edwards* v. *Arizona* to interrogation by the State once the Sixth Amendment has attached.[18] Thus, once an

son is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him"); *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984) (that right to counsel does not attach until initiation of adversary judicial proceedings is consistent with purposes which right to counsel serves); *Estelle* v. *Smith*, 451 U.S. 454, 469-70 (1981) (Sixth Amendment right to counsel attached for psychiatric examination because adversary proceedings had commenced).

18 *Jackson* recognized the heightened need for the assistance of counsel in the Sixth Amendment context:

> "[A]fter a formal accusation has been made—and a person who has previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation." *Michigan* v. *Jackson*, 475 U.S. at 632.



accused's Sixth Amendment right to counsel has attached and he expressly requests counsel, the police are prohibited—in yet another deliberately bright-line test—from reinitiating interrogation. 475 U.S. at 635-36. The *Jackson* rule provides that "if police initiate interrogation after a defendant's assertion . . . of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Id.* at 636.[19] The prophylactic rule of *Jackson* is essential in the Sixth Amendment context precisely because once the accused has requested (and in Minnick's case consulted with) an attorney, and the entire prosecutorial resources of the State are being focused upon him, any waiver upon police-initiated interrogation is unlikely to be voluntary. *See Michigan* v. *Harvey*, 110 S. Ct. at 1180 ("suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations"). The *Jackson* rule serves to protect the accused's express desire to rely on counsel. *See Patterson* v. *Illinois*, 487 U.S. at 291.[20]

19 Recently, in *Michigan* v. *Harvey*, 110 S. Ct. 1176, 1179 (1990), this Court confirmed the *Jackson* bright-line rule, stating:

> "[T]he *[Jackson]* Court created a bright-line rule for deciding whether an accused who has 'asserted' his Sixth Amendment right to counsel has subsequently waived that right . . . . [W]e decided that after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid . . . ."

20 Federal courts have held that when an accused invokes his right to have counsel present, any subsequent police-initiated interrogation is a violation of the *Jackson* prophylactic rule. *E.g.*, *Wilson* v. *Murray*, 806 F.2d 1232, 1238 (4th Cir.), *cert. denied*, 484 U.S. 870 (1987) (even if statement was voluntary, "in the sense that word is normally used, it was obtained in contravention of the bright-line rule of *Michigan* v. *Jackson*: Once the right to counsel is invoked . . . subsequent waiver is invalid"); *United States* v. *Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988) ("if a defendant asserts his

This concern is echoed in this Court's recent observation that "[t]he prosecution must not be allowed to build its case

right to counsel . . . and the police subsequently initiate questioning regarding, those offenses, any waiver of defendant's right to counsel for that interrogation is invalid"). *See also United States* v. *Roberts*, 869 F.2d 70, 73 (2d Cir. 1989) ("the accused, after once having asserted his right to assistance of counsel, cannot validly waive that right in police-initiated questioning even with a validly presented and executed *Miranda* waiver form"); *Fleming* v. *Kemp*, 837 F.2d 940, 945, 947 (11th Cir.), *cert. denied*, 109 S. Ct. 1764 (1989) ("*Jackson* thus sets forth a 'bright-line' rule when statements must be suppressed. . . . 'if police initiate interrogation after a defendant's assertion, . . . , of his right to counsel, . . . any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid' ").

Similarly, state supreme courts have without hesitation vacated convictions upon finding a violation of *Jackson*. *E.g.*, *Bussard* v. *Arkansas*, 295 Ark. 72, 747 S.W.2d 71, 73 (1988) (under *Jackson*, the Sixth Amendment renders the defendant's confession inadmissible: "[i]nasmuch as the sheriff initiated communication or conversation with [defendant], [defendant's] subsequent waiver was invalid"); *Roper* v. *Georgia*, 258 Ga. 847, 375 S.E.2d 600, 602, *cert. denied*, 110 S.Ct. 290 (1989) (under *Jackson*, "[i]f police initiate questioning after the invocation of the right to counsel, any uncounseled waiver of that right is invalid"); *Heffner* v. *Indiana*, 530 N.E.2d 297, 303 (Ind. 1988) ("[a]fter the Sixth Amendment right to counsel is invoked, a waiver in response to police-initiated interrogation, even after additional *Miranda* warnings, is not sufficiently voluntary and intelligent to meet the constitutional mandate of the Sixth and Fourteenth Amendments"); *Iowa* v. *Newsom*, 414 N.W.2d 354, 359 (Iowa 1987) ("State's initiation of further interrogation of the defendant, when he was represented by counsel, affirmatively circumvented defendant's Sixth Amendment rights [and] [t]he police-initiated interrogation of defendant nullifies any waiver that defendant may have made"); *White* v. *Kentucky*, 725 S.W.2d 597, 598 (Ky. 1987) (vacating conviction in light of *Jackson* because police reinitiated interrogation after accused requested counsel and counsel was neither present nor notified); *West Virginia* v. *Tenley*, 366 S.E.2d 657, 660 (W. Va. 1988) ("[s]ince the accused asserted his right to counsel at the initial appearance and the police officers, by their own admission, subsequently initiated an interrogation, we find that the defendant's waiver of the right to counsel is invalid, as it violated the accused's Sixth Amendment right to counsel"). Other state courts have had no difficulty applying *Michigan* v. *Jackson*. *See, e.g.*, *Connecticut* v. *Jones*, 205 Conn. 638, 534 A.2d 1199, 1205-06 (1987) (the "sixth amendment prohibited the state from initiating interrogation or intentionally creating a situation likely to induce the defendant to make incriminating statements without the assistance of his counsel"); *Lovett* v. *Delaware*, 516 A.2d 455, 464 (Del.), *cert. denied*, 481 U.S. 1018 (1987) (recognizing *Jackson*'s rule that any waiver is invalid during police-initiated discussions after an accused invokes his right to counsel); *Martinez* v. *United States*, 566 A.2d 1049, 1054 (D.C. 1989) (once a suspect invokes right to counsel, the right is waived only when the defendant thereafter initiates conversation with police); *Kansas* v. *Hartfield*, 245 Kan. 431, 781 P.2d 1050, 1055 (1989) (recognizing *Jackson*'s rule that police may not reinitiate interrogation after an accused invokes his Sixth Amendment right to counsel).



against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially-created protections." *Michigan* v. *Harvey*, 110 S. Ct. at 1180.

It is clear from the record here that while being interrogated by the FBI agents Minnick invoked his right to counsel, not once, but twice (JA 16). He told the FBI agents that he would make a statement only when his lawyer was "present" (JA 16, 74). The FBI agents recognized this clear invocation by immediately ceasing their questioning of Minnick (*id.*).[21] A different police officer (here Deputy Denham) appearing subsequent to the accused's invocation of counsel is still barred by *Jackson* from reinitiating interrogation. *Michigan* v. *Jackson*, 475 U.S. at 633. *See* note 15 *supra*. The State abridged Minnick's Sixth Amendment right to counsel and violated *Jackson* by reinitiating interrogation after Minnick had asserted his right to counsel.

21 An accused's initial invocation of counsel is not vitiated by subsequent statements made during police-initiated interrogation. *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (*per curiam*). In fact, the invocation of counsel upheld in *Smith* was equivocal whereas Minnick's request left no room for doubt that Minnick wanted an attorney present. When informed that he had the right to consult with an attorney Smith replied, " 'Uh, yeah, I'd like to do that.' " *Id.* at 97. Even ambiguous or equivocal invocations of the right to counsel trigger the *Jackson* prophylactic rule. *E.g.*, *Towne* v. *Dugger*, 899 F.2d 1104, 1107-08 (11th Cir. 1990) (defendant's questions to officer of " 'what do you think about whether I should get a lawyer' " were "equivocal requests [for counsel] that require clarification before investigating officers initiate any further questioning"); *Smith* v. *Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988) ("[w]hen the initial request is ambiguous or equivocal, all questioning must cease, except inquiry strictly limited to clarifying the request").

### C. The State Was Required Under The Sixth Amendment To Recognize Minnick's Attorney As The Sole Medium Between Minnick And His Interrogators

The significance of counsel's presence once adversary proceedings have begun "[e]mbod[ies] 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself.' " *Maine* v. *Moulton*, 474 U.S. at 169 (*quoting Johnson* v. *Zerbst*, 304 U.S. 458, 462-63 (1938)).[22] Once adversary criminal proceedings have commenced against an individual, he has a right to have counsel present when the government interrogates him. *Maine* v. *Moulton*, 474 U.S. at 176; *Brewer* v. *Williams*, 430 U.S. 387, 401 (1977); *Massiah* v. *United States*, 377 U.S. 201, 206 (1964). After the Sixth Amendment right to counsel has attached, the State must scrupulously honor the accused's choice to receive the assistance of counsel in dealing with the state. *Patterson* v. *Illinois*, 487 U.S. at 291 ("[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny"); *Maine* v. *Moulton*, 474 U.S. at 171 (the "Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance"). Thus where an agent of the prosecution seeks to interview an accused who is already represented, the general

22 This Court's rationale for guaranteeing the accused the presence of counsel at "critical stages" of the judicial proceedings finds its origin in *Powell* v. *Alabama*, 287 U.S. 45 (1932). In *Powell*, this Court underscored the need to provide the accused "with the guiding hand of counsel at every stage of the proceedings against him":

> "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Id.* at 57.

This Court has many times echoed the "guiding hand of counsel" philosophy set forth in *Powell*. *See, e.g.*, *Maine* v. *Moulton*, 474 U.S. at 170 ("to deprive a person of counsel during the period prior to trial may be more damaging than the denial of counsel during the trial itself").



rule has been that "counsel should have been notified prior to [the] examination." *Estelle* v. *Smith*, 451 U.S. 454, 474 (1981) (Rehnquist, J., concurring). *See also Powell* v. *Texas*, 109 S. Ct. 3146, 3147 (1989) ("the Sixth Amendment right to counsel precludes such an examination without first notifying counsel"); *Satterwhite* v. *Texas*, 486 U.S. 249, 254 (1988) (holding that defense counsel must be given advance notice of examination).

As this Court held in *Michigan* v. *Jackson*, " '[t]he simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.' " 475 U.S. at 633 n.7. Evincing similar doubt about his ability to field questions from police, Minnick expressly told the FBI agents who appeared to interrogate him that he needed an attorney (JA 16). When the accused decides that he cannot deal with the police alone, the very purpose of having counsel present is to act as a medium between the accused and the authorities. *See Maine* v. *Moulton*, 474 U.S. at 170-71 n.7 (" 'the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen' " (*quoting Brewer* v. *Williams*, 430 U.S. at 415 (Stevens, J., concurring))). Although derived from the Fifth Amendment concern against self-incrimination, the bright-line rule of *Jackson* is rooted in the Sixth Amendment guarantee that an accused may rely on his counsel to act as such a medium. *Michigan* v. *Jackson*, 475 U.S. at 632.[23]

23 Respecting the accused's invocation of his Sixth Amendment right to counsel is even more essential where, as here (JA 46-47, 74), the police reinitiated interrogation of Minnick after he had established an attorney-client relationship.

As the brief of *amicus curiae* the Mississippi State Bar Association demonstrates, the interrogation of an accused without affording counsel an opportunity to be present appears to constitute an unethical form of trial preparation. Such violations have been noticed in opinions of this Court. *See, e.g.*, *United States* v. *Henry*, 447 U.S. 264, 275 & n.14 (1980) (noting the ethical rule in regard to an "impermissible interference with the righ. to the assistance of counsel"); *Maine* v. *Moulton*, 474 U.S. at 187-88 (Burger, C.J., dissenting) (noting that the Court referred to the ethical rule in *United States*

In analyzing the scope of the right to counsel, this Court has "ask[ed] what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage." *Patterson* v. *Illinois*, 487 U.S. at 298. Once the Sixth Amendment has attached, counsel's role in a custodial interrogation setting is quite apparent.[24] It is proper for defense counsel to prevent the police from building a case solely out of the mouth of the accused. *Michigan* v. *Harvey*, 110 S. Ct. at 1180. A defense attorney imbued with the knowledge of the " 'intricacies of substantive and procedural criminal law,' " *Maine* v. *Moulton*, 474 U.S. at 170 (quoting *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984)), serves as armament against state interrogators.[25] Where the unassisted accused might otherwise acquiesce to police interrogation, "an attorney might well advise his client to remain silent in the face of interrogation by the police, and in doing so would be 'exercising [his] good professional judgment . . . to protect to the extent of his ability the rights of his client.' " *Fare* v. *Michael C.*, 442 U.S. at 721 (*quoting Miranda* v. *Arizona*, 384 U.S. at 480-

v. *Henry* to inform its determination of whether "the State deliberately circumvented counsel with regard to the 'subject of representation' "). *See also Patterson* v. *Illinois*, 487 U.S. at 301 (Stevens, J., dissenting); *Michigan* v. *Harvey*, 110 S. Ct. at 1189 n.12 (Stevens, J., dissenting); *Moran* v. *Burbine*, 475 U.S. at 464 n.53 (Stevens, J., dissenting). *But see Massiah* v. *United States*, 377 U.S. at 210-11 (White, J., dissenting).

24 *See United States* v. *Rodriguez*, 888 F.2d 519, 526 (7th Cir. 1989) (Easterbrook, J.) ("[the defendant] had become a litigant, and there are sound reasons for requiring one litigant to approach its adversary through counsel . . . . [The police] [t]rying to continue the conversation outside the ken of counsel in such circumstances endangers the prosecution as well as the defendant's legal entitlements").

25 Defendants like Minnick possess scant resources for deflecting the calculated maneuvers of state interrogators: " 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence.' " *Maine* v. *Moulton*, 474 U.S. at 169 (*quoting Powell* v. *Alabama*, 287 U.S. at 69).



81). In seeking to help the accused dispose of unwarranted charges, this Court has also emphasized the importance of counsel's presence in the event that the advisable course of action for the accused is to cooperate and give a statement. *E.g.*, *Fare* v. *Michael C.*, 442 U.S. at 719.

By stating to the FBI agents that if they came back on Monday, "he would make a more complete statement *with his attorney present*" (JA 16; emphasis supplied), Minnick articulated his desire to have counsel available during any interrogation. The Mississippi Supreme Court decision provides little protection for such a request, offering instead a rule that has no foundation in the decisions of this Court (JA 114-15, 117). The constitutional right to counsel is satisfied, according to the Mississippi ruling, so long as the police, before reinitiating interrogation, permit the accused to consult with counsel (JA 76). If this were truly the rule of *Edwards* v. *Arizona* and *Michigan* v. *Jackson*, police would be encouraged to engage in reinitiated interrogation every time the accused's lawyer closed the door on the way out of the prison. Presumably, such interrogation could occur immediately preceding trial or even during trial itself, so long as a new *Miranda* warning were offered each time the police entered the accused's cell. Given counsel's crucial role in protecting the rights of the accused, this Court has held that counsel must have a realistic opportunity to provide the necessary assistance to an accused who has expressed his intimidation in the face of the serried ranks of law enforcement. *See, e.g.*, *Maine* v. *Moulton*, 474 U.S. at 169; *Coleman* v. *Alabama*, 399 U.S. 1, 7 (1970) (plurality) (Op. of Brennan, J.). *See also United States* v. *Wade*, 388 U.S. 218, 226 (1967) ("the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial").

The decision of the Mississippi Supreme Court countenancing the reinitiated interrogation is at odds with this Court's Sixth Amendment jurisprudence, and, in and of itself, requires reversal.

## CONCLUSION

For the foregoing reasons, the judgment of the Mississippi Supreme Court affirming Minnick's conviction should be reversed.

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Respectfully submitted,

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# STATUTORY APPENDIX

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**U.S. Const. amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. Const. amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**U.S. Const. amend. VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**U.S. Const. amend. XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *